Filed 6/19/19 P. v. Roman CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL SEGURA ROMAN, Defendant and Appellant.	A153966 (Napa County Super. Ct. No. CR-168666)

A jury convicted Miguel Segura Roman of 38 counts of sex offenses against his two daughters, D.D. and R.D., and he was sentenced under the one strike law (Pen. Code, § 667.61) to an aggregate term of 740 years to life in prison.[1] Roman argues certain convictions are not supported by substantial evidence; he was convicted and punished for multiple offenses based on the same act; the court committed instructional error; and the restitution award constitutes an abuse of discretion. We correct a clerical error in the abstract of judgment but otherwise affirm.

BACKGROUND

A.

The Napa County District Attorney charged Roman by information with three counts of sex with a child 10 years of age or younger (§ 288.7, subd. (a); counts 1, 9, 17), three counts of sexual penetration with a child 10 years of age or younger (§ 288.7,

[1] Undesignated statutory references are to the Penal Code.

subd. (b); counts 2, 10, 18), and 31 counts of a lewd act on a child (§ 288, subd. (a); counts 3–8, 11–16, 19–37). These allegations involved D.D. and were grouped into five time periods corresponding with her age at the time of the alleged offenses: beginning in March 2009, when eight-year-old D.D. and her family moved to Napa County. Roman also was charged with two counts of a lewd act on R.D. (§ 288, subd. (a); counts 38–39) beginning when she was four years old. Sentencing enhancements were alleged for personal infliction of bodily harm as to count 37 (§ 667.61, subds. (a), (c)(8), (d)(6)–(7)) and for the involvement of multiple victims on the lewd conduct counts (*id.*, subds. (b), (c)(8), (e)(4), (j)(2)).

B.

Roman, his wife (Mother), and their four children lived together until November 2013, when Roman was arrested after 13-year-old D.D.'s pregnancy was confirmed. D.D., age 17 at the time of trial, testified Roman first digitally penetrated her vagina when she was about six years old. The molestations began as playful games in which he chased and touched her. Later, Roman digitally penetrated her on numerous occasions when they were alone in the family's shared bedroom, and he would cover her face with a blanket or towel. He also sometimes digitally penetrated her while she showered. Within a year, Roman progressed to having sexual intercourse with D.D.

In March 2009, the family moved to Napa County, and Roman increased the frequency of his abuse of then eight-year-old D.D. She testified that, after the family's move and through the last remembered incident in 2013, Roman both digitally penetrated her and had sexual intercourse with her "once a week." Most of these violations occurred in D.D.'s bedroom in the middle of the night. He continued to use a towel or blanket to cover her face. D.D. described kicking Roman, who would tell her to go back to sleep or use force to hold her still. About once or twice a month during that time period, he also touched the inside and outside of her vagina with his fingers when she was in the bathroom. D.D. could distinguish between the digital and penile penetrations due to size differences and ejaculation.

D.D. last recalled Roman having sex with her in May or June 2013, when she was 13 years old. The incident occurred in her bedroom after Mother left for work. D.D. remembered Roman became angry when she pulled his hair in an attempt to make him stop.

In November 2013, Mother noticed D.D. was withdrawn and trying to hide her stomach. When she asked D.D. if she had been raped, D.D. nodded and started crying. When asked by whom, D.D. said, "my dad." D.D.'s pregnancy was confirmed the next day; she was five to six months pregnant. D.D. told the nurse that Roman began molesting her, usually while she was asleep, when she was nine years old. D.D. also told the nurse Roman had sex with her in May or June 2013. At trial, D.D. explained she was too embarrassed to admit the true frequency.

The nurse contacted the police and child protective services. D.D. made a recorded pretext call to Roman. He first denied molesting D.D. but eventually said "it was a mistake," asked her to forgive him, and threatened to harm himself. In a November 2013 police interview, Roman denied any sexual touching of either daughter and suggested D.D. was lying. When D.D.'s baby was born in early 2014, DNA evidence showed Roman was the father.

In November 2013, R.D. underwent a physical exam that neither confirmed nor negated sex abuse. Sometime after Roman's arrest, R.D. told Mother that Roman molested her. Deputy Sheriff Chris Pacheco conducted a second forensic interview with five-year-old R.D. in January 2014. In this interview, which was played for the jury, R.D. said Roman had touched her vagina (which she called her "front butt") with his hand more than once. First, she described feeling something touch her "real quick" while sitting on the couch watching television with Roman. When Pacheco asked R.D. about a second time, she described another incident when Roman touched her vagina, underneath her clothes, while she was sitting on the couch and Mother was cooking dinner. After further questioning, R.D. pointed to the crotch of the boy doll when asked what part had touched her. She said Roman touched her with his "front part" while sitting on the couch with her brothers. At trial, then nine-year-old R.D. testified Roman used his hand to

touch her "front butt" only "[o]ne time," when they were alone, sitting on the couch watching television.

Roman conceded he was guilty of count 37 (corresponding to D.D.'s pregnancy) and focused his defense on the counts involving R.D. The forensic interviewer who conducted an initial interview of R.D. was called as a defense witness. When R.D. was asked, shortly after Roman's arrest, if anyone had ever touched her "in a way [she] didn't like in [her] private areas," she responded, "no." A defense expert also testified children may be influenced by repeated or suggestive questioning.

C.

The jury returned guilty verdicts on all 37 counts involving D.D. and one count involving R.D. (count 38). Attempts to reach a verdict on count 39 (lewd act on R.D.) ended in deadlock and a mistrial. The jury found the enhancement allegations true for all sustained counts. Imposing consecutive sentences on all counts, the trial court sentenced Roman to an aggregate term of 740 years to life in state prison. The court stayed punishment on the bodily harm enhancement (§ 667.61, subd. (d)(6), (7)) and awarded noneconomic victim restitution totaling $1.15 million.

DISCUSSION

A.

Roman contends D.D.'s "generic testimony" is insufficient to support his convictions on counts 1 through 36, and the error amounts to a due process violation. We disagree.

1.

When faced with a substantial evidence challenge, we "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 318–319.) We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate witness credibility. (*People v. Jones* (1990)

51 Cal.3d 294, 314 (*Jones*).) "A reviewing court must accept logical inferences the [fact finder] might have drawn from the circumstantial evidence. [Citation.] ' "A reasonable inference, however, 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work.' " ' " (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1416–1417, disapproved on another point by *People v. Farwell* (2018) 5 Cal.5th 295, 304 & fn. 6.)

2.

"Child molestation cases frequently involve difficult . . . proof problems. A young victim . . . assertedly molested over a substantial period by a parent or other adult residing in his home, may have no practical way of recollecting, reconstructing, distinguishing or identifying by 'specific incidents or dates' all or even any such incidents." (*Jones, supra*, 51 Cal.3d at p. 305.)

In *Jones, supra*, 51 Cal.3d 294, our Supreme Court held an alleged child victim's generic testimony may be sufficiently substantial to sustain convictions on multiple counts, so long as the victim "describe[s] *the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy)[;] . . . the *number of acts* committed with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., 'twice a month' or 'every time we went camping')[; and] . . . *the general time period* in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us'), to assure the acts were committed within the applicable limitation period. Additional details regarding the time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim's testimony, but are not essential to sustain a conviction." (*Id.* at p. 316.) The *Jone*s court also rejected the notion generic testimony deprives a defendant of the right to present a defense. (*Id.* at pp. 320–321.)

Roman suggests the *Jones* holding does not apply to multiple counts, and D.D.'s generic testimony can only support a single conviction for continuous sexual abuse of a

child under section 288.5. He is wrong. (See *People v. Matute* (2002) 103 Cal.App.4th 1437, 1444 ["we reject appellant's suggestion that generic testimony is acceptable only when a defendant is charged under a 'course of conduct' statute but not otherwise"].) *Jones* itself upheld a defendant's conviction of multiple counts on the basis of generic testimony. (*Jones, supra,* 51 Cal.3d at pp. 302–305, 322–323.) The *Jones* court crafted its evidentiary rules to ensure that a resident child molester, like Roman, cannot evade substantial criminal liability merely because he repeatedly molested the victim over a long period of time, thereby making it difficult for the victim to recollect specific incidents and dates. (*Id.* at p. 305.)

Roman also maintains D.D.'s testimony was not sufficiently specific to meet the *Jones* standards. Not so. In counts 1, 9, and 17, Roman was charged with violating section 288.7, subdivision (a): "Any person 18 years of age or older who engages in sexual intercourse . . . with a child who is 10 years of age or younger is guilty of a felony . . . ." D.D. testified Roman had sex with her on a weekly basis from the time they moved to Napa County to the last time, when she remembered pulling Roman's hair. D.D. testified the incidents of intercourse happened in her bedroom. Mother testified to both Roman's and D.D.'s birth dates and that the family moved to Napa County in March 2009, when D.D. was eight years old. D.D. sufficiently described the acts committed (sex with a child 10 years or younger), the number of acts committed (once a week), and the general time period (from the move in March 2009 through May 2013) to support the three counts for which Roman was convicted.

In counts 2, 10, and 18, Roman was charged with violating section 288.7, subdivision (b): "Any person 18 years of age or older who engages in . . . sexual penetration, as defined in Section 289, with a child who is 10 years of age or younger is guilty of a felony . . . ." D.D. testified to two circumstances in which Roman digitally penetrated her after the family moved—weekly in her bedroom, and monthly in the bathroom while she showered. That testimony, along with evidence regarding Roman's and D.D.'s ages, was sufficient to describe the acts committed, the number of acts committed (at least once a week or 52 times per year), and the general time period.

Finally, in counts 3 through 8, 11 through 16, and 19 through 36, Roman was charged with lewd acts on a child. Six lewd act counts were charged for each of the five age-based time periods: two counts involving vaginal touching in the bathroom, two counts involving vaginal touching in the bedroom, and two counts involving Roman touching D.D.'s body or vagina with his penis. In order to prove a violation of section 288, subdivision (a), the People must prove the defendant touched a child under the age of 14 and sexual gratification was intended at the time such touching occurred. (*People v. Martinez* (1995) 11 Cal.4th 434, 444.) Both the digital and penile penetrations D.D. described qualify as lewd acts. (§ 288, subd. (a); *People v. Scott* (1994) 9 Cal.4th 331, 343–344 ["[w]here the defendant commits an act under circumstances that are prohibited by both section 288 and another sex crime statute, a violation under either or both statutes may be charged and found"].)

Under any understanding of D.D.'s testimony, she suffered at least 220 lewd acts from March 2009 through May 2013. Notwithstanding Roman's assertion to the contrary, the jury could reasonably infer from D.D.'s and Mother's testimony that Roman was guilty of six lewd acts during each of the five time periods corresponding to her age. Substantial evidence supports the challenged counts. There was no due process violation. (*Jones, supra,* 51 Cal.3d at p. 318.)

B.

Roman also challenges the trial court's unanimity instruction. Roman's argument is unpersuasive.

1.

The California Constitution guarantees a criminal defendant the right to a unanimous jury verdict. (Cal. Const., art. I, § 16; *Jones, supra*, 51 Cal.3d at p. 321.) A unanimity instruction is given to avert the possibility "the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed." (*People v. Sutherland* (1993) 17 Cal.App.4th 602, 612.) The court has a sua sponte duty to give such instruction when the evidence shows more than one act to support a single charged offense. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132, 1135.)

In cases involving generic testimony, "the jury may not be able to readily distinguish between the various acts, [but] it is certainly capable of unanimously agreeing that they took place in the number and manner described." (*Jones, supra*, 51 Cal.3d at p. 321.) Thus, "[i]n a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed, the standard unanimity instruction [(CALCRIM No. 3500)] should be given. [Citation.] But when there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction [(CALCRIM No. 3501)] which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim." (*Jones*, at pp. 321–322.)

We independently review an instruction to assess whether it accurately states the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) We consider whether it is reasonably likely the trial court's instructions, considered as a whole, misled the jury. (*People v. Carrington* (2009) 47 Cal.4th 145, 192.)

2.

After being given a summary description of counts 1 through 36, 38, and 39, the jury was instructed with a modified unanimity instruction: "The People have presented evidence of more than one act to prove that the defendant committed these offenses. You must not find the defendant guilty unless: [¶] 1. You all agree that the People have proved that the defendant committed *at least one of these acts* and you all agree on which act he committed for each offense; [¶] OR [¶] 2. You all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period and have proved that the defendant committed at least the number of offenses charged." (CALCRIM No. 3501, italics added.)

As to the counts involving D.D., Roman contends the italicized language incorrectly suggested to the jurors they could convict him of all 36 listed counts if they agreed he committed only one act. We assume Roman did not forfeit his current

challenge by failing to object below. (See § 1259; *People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) Nonetheless, he has not shown the jury may have misunderstood the instruction to permit a conviction on numerous counts despite unanimous agreement on only one act. The Fourth District rejected this precise argument in *People v. Milosavljevic* (2010) 183 Cal.App.4th 640, 648.

Here, the standard CALCRIM No. 3501 instruction was properly modified to account for the existence of multiple counts. The jury was instructed: "You must not find the defendant guilty unless: [¶] 1. You all agree that the People have proved that the defendant committed at least one of these acts *and you all agree on which act* he committed for *each offense*." (Italics added.) Furthermore, the trial court instructed, pursuant to CALCRIM No. 3515: "Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one." "We presume that jurors are intelligent and capable of understanding and applying the court's instructions." (*People v. Butler* (2009) 46 Cal.4th 847, 873.) It is not reasonably likely the jury read the instruction to allow them to convict Roman of 36 counts when they unanimously agreed on only one act. Rather, "construing the parts of [CALCRIM No. 3501] as a whole, the jurors presumably understood the court's unanimity instruction required them to all agree on an act he committed for *each* offense for a guilty finding on that offense." (*People v. Milosavljevic*, *supra*, 183 Cal.App.4th at p. 650.)

3.

Roman raises a different argument with respect to count 38. He urges the standard unanimity instruction (CALCRIM No. 3500) should have been given, instead of the unanimity instruction modified for generic testimony (CALCRIM No. 3501), because the evidence regarding R.D. was specific. (See *Jones*, *supra*, 51 Cal.3d at p. 321.) We disagree.

CALCRIM No. 3501's first prong is identical to CALCRIM No. 3500. CALCRIM No. 3501 merely "provides an *additional* manner by which a jury may unanimously find a defendant guilty." (*People v. Vasquez* (2017) 14 Cal.App.5th 1019,

1046.) We are unpersuaded that giving CALCRIM No. 3501 in a case involving both generic and specific testimony is erroneous. (See *People v. Fernandez* (2013) 216 Cal.App.4th 540, 555–558.)

C.

Roman maintains his convictions on counts 1, 9, and 17 (§ 288.7, subd. (a)) duplicate his convictions on counts 2, 10, and 18 (§ 288.7, subd. (b)) because they are based on the same act—penetration by a penis. We need not consider this argument in detail because Roman fails to establish the premise for his argument: that he has been convicted of multiple offenses for *any singular act*.

In counts 1, 9, and 17, Roman was charged with having sex with a child 10 years old or younger (§ 288.7, subd. (a)). In counts 2, 10, and 18 Roman was charged with sexual penetration of a child 10 years old or younger (§ 288.7, subd. (b)). As Roman concedes, the latter offense expressly excludes penetration by a penis, except in those cases where the victim does not know what object penetrated her. (§§ 288.7, subd. (b), 289, subd. (k); CALCRIM No. 1128.) The jury was so instructed. In contrast, in order to convict Roman of counts 1, 9, and 17, the jury had to find he engaged in three acts of "penetration, no matter how slight, of the vagina . . . by the penis." (CALCRIM No. 1127.)

Roman assumes, without citing any evidence in the record, that he was convicted of sexual penetration for penetrating D.D. with his penis in a scenario where she did not know what object was used. Here, however, D.D. made clear she could distinguish between Roman's digital and penile penetration due to size differences and ejaculation. Thus, we will not speculate that the jury convicted Roman on counts 2, 10, and 18 for acts other than three of the numerous digital penetrations D.D. described.

D.

Roman maintains the trial court erred in instructing the jury, in accordance with CALCRIM No. 370, that the People need not prove motive. We proceed to the merits, assuming for the sake of argument that Roman's current claims were not forfeited by his failure to object below. Roman's challenge is meritless.

The trial court instructed the jury with CALCRIM No. 370, which states: "The People are not required to prove that the defendant had a motive to commit any of the crimes charged. In reaching your verdict you may, however, consider whether the defendant had a motive. [¶] Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show defendant is not guilty." The trial court also instructed the jury on the mental state required for the lewd act charges—i.e., that the People must prove the "defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child." (CALCRIM No. 1110; accord, *People v. Martinez, supra*, 11 Cal.4th at pp. 442, 452.)

In suggesting CALCRIM No. 370 confused the jury and relieved the prosecution of its burden to prove the intent required for count 38, Roman misplaces his reliance on *People v. Maurer* (1995) 32 Cal.App.4th 1121. That case is distinguishable because it involved a statute that, unlike section 288, subdivision (a), required the prosecution to prove motive as an element. (*Maurer*, at pp. 1125–1127 [§ 647.6 required proof that defendant was " 'motivated by an unnatural or abnormal sexual interest in children' "].)

In cases decided after 1995, our Supreme Court has made clear motive and intent are not synonymous. (*People v. Cash* (2002) 28 Cal.4th 703, 738; *People v. Hillhouse* (2002) 27 Cal.4th 469, 504; cf. *People v. Martinez, supra*, 11 Cal.4th at p. 443 & fn. 7, 444, 450 & fn. 16, 451 [using "sexually motivated" as a synonym for intent required to prove lewd act].) "Motive describes the reason a person chooses to commit a crime. The reason, however, is different from a required mental state such as intent or malice." (*Hillhouse*, at p. 504.) Contrary to Roman's assertion, there is no reasonable likelihood the jury ignored the intent element of the lewd act charges. (See *Cash*, at p. 739 [because "instructions as a whole did not use the terms 'motive' and 'intent' interchangeably," there was "no reasonable likelihood that the jury understood those terms to be synonymous"].)

E.

In an alternative to his duplicative conviction argument, Roman contends punishment on the sexual penetration counts (§ 288.7, subd. (b); counts 2, 10, 18) should be stayed pursuant to section 654. "Section 654 precludes multiple punishment for a single act or indivisible course of conduct." (*People v. Hester* (2000) 22 Cal.4th 290, 294.) The purpose of the statute is "to insure that a defendant's punishment will be commensurate with his culpability." (*People v. Perez* (1979) 23 Cal.3d 545, 551.) We agree with the People that Roman's argument is unsupported. Simply put, he has not demonstrated counts 2, 10, and 18 were accomplished by the same acts or indivisible course of conduct for which counts 1, 9, and 17 were accomplished.

Even if we were to ignore the bathroom incidents and assume D.D.'s testimony suggests some of the bedroom digital penetration acts occurred on the same occasion as intercourse, Roman has nonetheless failed to demonstrate a violation of section 654. " ' "Section 654 has been applied not only where there was but one 'act' in the ordinary sense . . . but also where a course of conduct violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654." [Citation.] [¶] Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' " (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507, italics omitted.)

"However, the rule is different in sex crime cases. Even where the defendant has but one objective—sexual gratification—section 654 will not apply unless the crimes were either incidental to or the means by which another crime was accomplished. [Citations.] [¶] But, section 654 does not apply to sexual misconduct that is 'preparatory' in the general sense that it is designed to sexually arouse the perpetrator or the victim. . . . '[M]ultiple sex acts committed on a single occasion can result in multiple statutory violations. Such offenses are generally "divisible" from one another under section 654,

and separate punishment is usually allowed. [Citations.]' [Citation.] If the rule were otherwise, 'the clever molester could violate his victim in numerous lewd ways, safe in the knowledge that he could not be convicted and punished for every act.' " (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1006.)

Roman does not explicitly argue, much less point to any evidence, that any of his digital penetrations of D.D. were incidental to or merely the means by which sex was accomplished. Accordingly, even if the acts underlying each of counts 2, 10, and 18 occurred on the same occasions as the acts underlying counts 1, 9, and 17 respectively, Roman has not shown the trial court could not separately punish each of the two distinct sex acts.

F.

Finally, Roman argues the trial court's $1.15 million noneconomic restitution award is excessive and unsupported by substantial evidence.

1.

Generally, restitution orders are limited to the victim's economic loss. (§ 1202.4, subd. (f); *People v. Smith* (2011) 198 Cal.App.4th 415, 431 (*Smith*).) An exception is specified in section 1202.4, subdivision (f)(3)(F), which provides for an award of victim restitution for "[n]oneconomic losses, including, but not limited to, psychological harm, for felony violations of Section 288, 288.5, or 288.7."

We review a trial court's restitution order for abuse of discretion. (*People v. Giordano* (2007) 42 Cal.4th 644, 663.) " ' "When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court." ' " (*In re Johnny M.* (2002) 100 Cal.App.4th 1128, 1132.) "Unlike restitution for economic loss, however, loss for noneconomic loss is subjectively quantified." (*Smith, supra*, 198 Cal.App.4th at p. 436.) We will affirm a restitution order for noneconomic damages that "does not, at first blush, shock the conscience or suggest passion, prejudice or corruption on the part of the trial court." (*Ibid.*; *People v. Lehman* (2016) 247 Cal.App.4th 795, 801–802.)

2.

The prosecutor filed a sentencing brief requesting the court order noneconomic restitution to D.D., R.D., and Mother. Specifically, the district attorney sought a total of $1.15 million for noneconomic losses—$1 million for D.D., $100,000 for R.D., and $50,000 for Mother. The People also requested reimbursement to the Victim Compensation Board in the amount of $5,670, for mental health counseling provided to D.D., R.D., their two brothers, and Mother. With respect to Mother, the district attorney stated, "In response to supporting her daughters and cooperating with the investigation and prosecution of this case, her family has crumbled. She is also faced with helping [D.D.] raise . . . her grandchild and her husband and daughter's child."

Roman opposed the requested amount of noneconomic damages as excessive. At sentencing, after hearing victim impact statements from both D.D. and Mother, the trial court stated, "[t]he Court is ordering *non-economic* damages in the following amounts. . . . As to [D.D], . . . the Court is ordering economic damages in the amount of a million dollars. She is a mother. She has to raise a child and it seems appropriate to the Court. [¶] As to [R.D.], the Court will order non-economic damages of $100,000. [¶] As to [Mother], the mother of both girls, the Court is ordering non-economic damages of $50,000." (Italics added.)

3.

First, Roman argues the court abused its discretion when it ordered him to pay $1 million to D.D. and $100,000 to R.D. because such amounts are out of proportion to the costs of mental health counseling. He is wrong.

Although the reporter's transcript and minutes are not without ambiguity, our review of the entire record makes it clear the trial court awarded restitution for *noneconomic* loss.[2] Roman ignores the fundamental distinction between economic and

[2] The abstract of judgment contains a clerical error. Judicial Council Forms, form CR-292 for indeterminate sentencing, section 11 misidentifies the court's $1.15 million award as "economic damages" We order the abstract of judgment corrected. (See *People v. High* (2004) 119 Cal.App.4th 1192, 1200.)

noneconomic damages. Noneconomic damages are not based on any amount spent by the victim. "Noneconomic damages are 'subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.' " (*Smith, supra*, 198 Cal.App.4th at p. 431, quoting Civ. Code, § 1431.2, subd. (b)(2).)

People v. Lehman, supra, 247 Cal.App.4th 795, like this case, involved acts of child molestation spanning many years. The trial court awarded the first victim, who had suffered extensive and substantial sexual abuse at the hands of her grandfather, $900,000 in noneconomic restitution and ordered $100,000 to her sister, who suffered " 'only the early stages of the [d]efendant's grooming behavior.' " (*Id.* at pp. 802–803; see *id.* at pp. 797–798.) On appeal, the defendant argued the restitution award was unsupported, contending it "was based solely on his criminal conviction and therefore constituted unauthorized punitive damages." (*Id.* at p. 803.) Our colleagues in Division One affirmed, concluding "the prosecution was not required to present victim testimony or affidavits or expert declarations in connection with the restitution hearing." (*Ibid*.) Because "section 1202.4 does not require any particular kind of proof to establish a victim's losses" and the award was supported by the probation report, the two victims' testimony at trial, and one victim's statements at the sentencing hearing, *Lehman* determined the award had "sufficient support." (*Lehman*, at pp. 803–804.) The $1 million award did not shock the conscience or suggest passion, prejudice, or corruption on the part of the trial court. (*Id.* at pp. 801, 803.)

Here, the facts are more egregious than those presented in *Lehman*. After suffering years of serious sexual abuse, D.D. gave birth to her own father's child. It was not unreasonable for the trial court, who observed both R.D.'s and D.D.'s demeanor on the stand and heard D.D.'s and Mother's impact statements, to conclude each suffered pain and suffering likely to have an ongoing psychological impact. It is callous of Roman to suggest, as he does in his opening brief, R.D. will have no psychological repercussions. Childhood sexual abuse "is not the kind of act that results in emotional and psychological harm only occasionally." (*J. C. Penney Casualty Ins. Co. v. M. K.*

(1991) 52 Cal.3d 1009, 1026.) In her impact statement, Mother also said, "[R.D.] did have a reaction, she started to sleep with me for about 6 months, her grades were lower." R.D. also received counseling.

Given the duration and nature of Roman's crimes, we cannot say the trial court's restitution award shocks the conscience or suggests passion, prejudice or corruption. (*Smith, supra*, 198 Cal.App.4th at p. 436.) There was no abuse of discretion.

4.

Roman also challenges the award of $50,000 in noneconomic restitution to Mother. He contends she was not a victim of his violation of sections 288 or 288.7 and, thus, the award is not authorized by section 1202.4. Roman forfeited his statutory argument by failing to develop it. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) In any event, this argument was recently rejected by our colleagues in Division One. (See *People v. Montiel* (2019) 35 Cal.App.5th 312, 318–326.)

DISPOSITION

The trial court is directed to prepare an amended abstract of judgment correcting the clerical error identified in footnote 2. The amended abstract of judgment shall be forwarded to the appropriate agencies. In all other respects, the judgment is affirmed.

_____
BURNS, J.

WE CONCUR:

_____
SIMONS, Acting P. J.

_____
NEEDHAM, J.

A153966